



## **Agricultural Marketing Service**

### **7 CFR Part 930**

[Doc. No. AMS-SC-20-0079; SC20-930-4 FR]

**Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin;**

### **Modification of Assessment Rate**

**AGENCY:** Agricultural Marketing Service, Department of Agriculture (USDA).

**ACTION:** Final rule.

**SUMMARY:** This rule implements a recommendation from the Cherry Industry Administrative Board (Board) to decrease the portion of assessments allocated to research and promotion activities and increase the portion allocated to administrative expenses. The overall assessment rate remains unchanged. The assessment rate will remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Thomas Nalepa, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or email: [Thomas.Nalepa@usda.gov](mailto:Thomas.Nalepa@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or E-mail: Richard.Lower@usda.gov.

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement and Order No. 930, both as amended (7 CFR part 930), regulating the handling of tart cherries produced in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. Part 930 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Board locally administers the Order and is comprised of producers and handlers of tart cherries operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in

effect, tart cherry handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate will be applicable to all assessable tart cherries for the 2020-21 crop year and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule decreases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.00275 per pound of tart cherries and increases the portion allocated to administrative expenses from \$0.00075 to \$0.003 per pound of tart cherries. The overall

assessment rate established for the Board for the 2020-21 and subsequent fiscal periods remains unchanged at \$0.00575 per pound of tart cherries.

The Order provides authority for the Board, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Board's needs and with the costs of goods and services in their local areas and are thus in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2019-20 fiscal period, the Board recommended, and USDA approved, an assessment rate of \$0.00575 per pound of tart cherries that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Committee or other information available to USDA.

During the September 10, 2020, meeting, the Board recommended 2020-21 expenditures of \$795,000 and an assessment rate of \$0.00575 per pound of tart cherries. In comparison, last year's budgeted expenditures were \$1,956,500. The total assessment rate remains unchanged by this action. However, this rule decreases the portion of

the assessment rate allocated to research and promotion activities from \$0.005 to \$0.00275 per pound of tart cherries and increases the portion allocated to administrative expenses from \$0.00075 to \$0.003 per pound of tart cherries. This shift in allocation will allow the Board to fund its administrative obligations while continuing limited research and promotion activities to help market this season's below-average crop. The revised allocation should ensure the availability of adequate administrative funds despite a significant draw-down in reserves resulting from the 2019-20 crop year assessment rate reduction.

The major expenditures recommended by the Board for the 2020-21 year include \$350,000 for research and promotion, \$255,000 for salaries and wages, and \$130,000 for other administrative expenses. Budgeted expenses for these items in 2019-2020 were \$1,514,500, \$250,000, and \$130,000, respectively.

The Board derived the recommended assessment rate by considering anticipated administrative expenses, an estimated crop of 141.46 million pounds of tart cherries (down from last year's production of 236.3 million pounds), the current status of reserves, and the needs of the industry with regards to research and promotion activities. Income derived from handler assessments is calculated at \$813,395 (141.46 million pounds x \$0.00575/pound). The

Board anticipates that due to approved exemptions and loss adjustments the actual income from assessments will be closer to \$783,992. Assessment income, along with interest income and funds from the Board's authorized reserve, should be adequate to cover budgeted expenses of \$795,000. Funds in the reserve are estimated to be \$75,096 at the end of the 2020-21 fiscal year.

The assessment rate established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the Board or other available information.

Although this assessment rate will be in effect for an indefinite period, the Board will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or USDA. Board meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking will be undertaken as necessary. The Board's 2020-21 budget and those for subsequent fiscal periods will be reviewed and, as appropriate, approved by USDA.

## **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 400 producers of tart cherries in the regulated area and approximately 40 handlers of tart cherries who are subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$1,000,000 and small agricultural service firms have been defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS) and Board data, the average annual grower price for tart cherries during the 2019-20 season was approximately \$0.15 per pound. With total utilization at 236.3 million pounds, the total 2019-20 crop value is

estimated at \$35.45 million. Dividing the crop value by the estimated number of producers (400) yields an estimated average receipt per producer of \$88,613. This is well below the SBA threshold for small producers.

A free on board (FOB) price of \$0.82 per pound for processed tart cherries was derived from USDA's 2020 purchases of dried tart cherries at an average price of \$4.11 per pound. The dried cherry price was converted to a raw product equivalent price at an industry recognized ratio of five to one. Based on utilization, this price represents a good estimate of the price for processed cherries. Multiplying this FOB price by total utilization of 236.3 million pounds results in an estimated handler-level tart cherry value of \$193.8 million. Dividing this figure by the number of handlers (40) yields estimated average annual handler receipts of \$4.8 million, which is below the SBA threshold for small agricultural service firms. Assuming a normal distribution, the majority of producers and handlers of tart cherries may be classified as small entities.

This final rule decreases the portion of the assessment rate allocated to research and promotion activities from \$0.005 to \$0.00275 per pound of tart cherries and increases the portion allocated to administrative expenses from \$0.00075 to \$0.003 per pound of tart cherries. The overall assessment rate established



for the Board for the 2019-20 and subsequent fiscal periods remains unchanged at \$0.00575 per pound of tart cherries. The volume of assessable tart cherries for the 2020-21 season is estimated at 141.46 million pounds. Thus, the \$0.00575 rate should provide \$813,395 in assessment income (141.46 million pounds x \$0.00575/pound). The Board anticipates that due to approved exemptions and loss adjustments the total income from assessments will be \$783,992. Income derived from handler assessments, along with interest income and funds from the Board's authorized reserve, should be adequate to cover budgeted expenses.

The major expenditures recommended by the Board for the 2020-21 year include \$350,000 for research and promotion, \$255,000 for salaries and wages, and \$130,000 for other administrative expenses. Budgeted expenses for these items in 2019-20 were \$1,514,500, \$250,000, and \$130,000, respectively.

This rule shifts the allocation of the assessment rate to decrease the portion allotted for research and promotion, while increasing the amount allocated for administrative costs. This adjustment should provide enough funds for the Board's administrative obligations and decrease the funding for research and promotion activities to reflect the significant reduction in the 2020-21 crop.

Prior to arriving at this budget and assessment rate, the Board considered production history, crop estimates,

its financial statements, and the need to meet its administrative obligations and maintain some marketing efforts to increase demand for tart cherries. The Board discussed alternatives, including raising the assessment rate and borrowing funds; however, they were rejected due to the burden of increasing assessments on handlers and the cost of debt due to financing. The Board determined that 2020-21 expenditures of \$795,000 were appropriate, and the recommended assessment rate and allocation, along with funds from interest income, and funds from reserves, would be adequate to cover the budgeted expenses.

A review of historical information and preliminary information pertaining to the upcoming fiscal year indicates that the average grower price for the 2020-21 season should be approximately \$0.19 per pound of tart cherries. According to NASS statistics, this price is the average of the past three years. Therefore, the estimated assessment revenue for the 2020-21 crop year as a percentage of total grower revenue will be approximately 3.0 percent.

This action will not increase the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs will be offset by the benefits derived by the operation of the marketing order.

The Board's meeting was widely publicized throughout the tart cherry industry. All interested persons were invited to attend the meeting and participate in Board deliberations on all issues. Like all Board meetings, the September 10, 2020, meeting was a public meeting, and all entities, both large and small, were able to express views on this issue.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the OMB and assigned OMB No. 0581-0177, Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. No changes in those requirements will be necessary as a result of this rule. Should any changes become necessary, they would be submitted to OMB for approval.

This rule imposes no additional reporting or recordkeeping requirements on either small or large tart cherry handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

A proposed rule concerning this action was published in the **Federal Register** on December 16, 2020 (85 FR 81425). Copies of the proposed rule were also mailed or sent via email to all tart cherry handlers. The proposed rule was made available through the internet by USDA and the Office of the Federal Register. A 30-day comment period ending January 15, 2021, was provided for interested persons to respond to the proposal.

One comment was received that opposed any increase to the assessment rate and expressed concern that small growers suffered an unfair financial burden with respect to assessments. While this action does increase the portion of the assessment rate dedicated to administrative expenses, it decreases the portion dedicated to research and promotion. This action does not change the overall assessment rate currently in effect and will not increase the assessment cost on small or large handlers. The assessment rate is also calculated on a per pound basis so the cost to small and large handlers is shared proportionally based on their production volume.

Accordingly, no changes will be made to the rule as proposed, based on the comment received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Board and other available information, it is hereby found that this rule will tend to effectuate the declared policy of the Act.

#### **List of Subjects in 7 CFR Part 930**

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is amended as follows:

PART 930 - TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601-674

2. Section 930.200 is revised to read as follows:

\$ 930.200 Assessment rate.

On and after October 1, 2020, the assessment rate imposed on handlers shall be \$0.00575 per pound of tart cherries grown in the production area and utilized in the production of tart cherry products. Included in this rate is \$0.00275 per pound of tart cherries to cover the cost of the research and promotion program and \$0.003 per pound of tart cherries to cover administrative expenses.

Bruce Summers, Administrator,  
Agricultural Marketing Service.

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